No. ____

In The

Supreme Court of the United States

October Term, 1995

D.L. THOMAS and HAZEL THOMAS,

Petitioners,

v.

AMERICAN HOME PRODUCTS, INC., BOYLE-MIDWAY, INC., and AMAZING PRODUCTS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED

1. Whether there can be a constitutionally valid denial of petitioner D.L. Thomas' right to equal protection of the laws pursuant to the 5th and 14th amendments of the constitution of the United States, by placing him into a class inferior to others by reason of his illiteracy?

2. Whether a United States Court of Appeals may decide State Court retroactivity questions, or should the Court of Appeals certify unsettled questions regarding the retroactivity or prospectivity of State Court laws to the highest State Court?

3. Whether any Court of Appeals may overrule sub silentio, or without issuing an opinion, controlling authority of the circuit, without doing so en banc?

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PETITION FOR WRIT OF CERTIORARI

D. L. and Hazel Thomas, Petitioners, pray for a writ of certiorari to review and reverse the judgment of the Court of Appeals for the 11th Circuit, entered in this case on February 9, 1996.

OPINIONS AND ORDERS BELOW

Summary judgment was granted against your petitioners in the Northern District of Georgia by Judge Owen Forrester in an unpublished opinion in this products liability case. (2a) An unpublished amendment to that order was filed October 8, 1993 (22a). Petitioners' appealed to the 11th Circuit, which affirmed, per curiam, on October 19, 1994. 39 F.3d 325. (1a) Inasmuch as the 11th Circuit neither addressed nor distinguished controlling 11th Circuit authority on the questions presented, petitioners filed a suggestion of rehearing (or hearing) en banc and petition for rehearing. That petition was supplemented by petitioners to present to the 11th Circuit controlling authority which had been issued by the Supreme Court of Georgia in the case of *Banks v. ICI Americas, Inc.*, 264 Ga. 732 (450 S.E.2d 671) (1994). The *Banks v. ICI Americas, Inc.* case answered, affirmatively for your petitioners, the certified question that petitioners had requested that the 11th Circuit present to the Supreme Court of Georgia for resolution.

On June 5, 1995 the suggestion of rehearing (or hearing) en banc and petition for rehearing was denied. 58 F.3d 642 (24a) The denial of the suggestion of rehearing

(or hearing) en banc and petition for rehearing was withdrawn on June 15, 1995 (26a) and the parties were ordered to brief the effect of *Banks v. ICI Americas, Inc.* on the present case. Despite the Supreme Court of Georgia having issued an opinion in the unrelated case of *Banks v. ICI Americas, Inc.* which petitioners believe answered the proposed certified question in petitioners suggestion of rehearing (or hearing) en banc and petition for rehearing, in favor of your petitioners, the 11th Circuit ultimately denied in an unpublished order the suggestion of rehearing (or hearing) en banc and petition for rehearing on February 9, 1996. (28a)

JURISDICTION

The trial court in the Northern District of Georgia entered summary judgment on September 30, 1993, and the 11th Circuit Court of Appeals ultimately denied the suggestion of rehearing (or hearing) en banc and petition for rehearing and rendered its final opinion on February 9, 1996. This petition for a writ of certiorari is filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the 5th and 14th amendments to the Constitution of the United States are set forth in the appendix. (30a).

STATEMENT

A. FACTS

On February 8, 1990, Plaintiff, D. L. Thomas, was blinded when the contents of a floor drain violently exploded onto his head and face as he was attempting to place a drain cleaner into it. The drain cleaner he was using was Lewis Red Devil Lye (5/2/91 Depo. D. Thomas, p. 90). Lewis Red Devil Lye is marketed and distributed by Defendant, Boyle-Midway, Inc. (a/k/a Boyle-Midway Household Products, Inc.) (R. 3-64-"Ex. B", p. 2.) Unknown to Mr. Thomas, his co-workers, Tony White and Lawton Wofford, had used a liquid drain cleaner, Liquid Fire in the common drain system the day before. (Depo. White, p. 22; Depo. Wofford, p. 19.) Liquid Fire is manufactured, market and distributed by Amazing Products, Inc. (Affidavit of Duffy, Amazing Products, Inc.'s Summary Judgment Motion, R. 3-62-page-"Ex B" of document).

The day before Mr. Thomas was injured, he was working at the Fieldale Farms facility in Clarkesville, Georgia. At that time, Mr. Thomas and fellow employees were cleaning the building, rinsing the floor with a water hose. While cleaning the floor, they noticed that the water was not draining out of the various floor drains in the building (5/2/91 Depo. D. Thomas, p. 66). At that time, Mr. Thomas' supervisor, Lawton Wofford, went to the nearby Habersham Ace Hardware Store and purchased two cans of Lewis Red Devil Lye and one gallon of Liquid Fire (Depo. Wofford, p. 90).

Upon returning, Wofford and Tony White attempted to open the various drains. During this time, Mr. Wofford

and Mr. White used Lewis Red Devil Lye (a sodium hydroxide-base drain cleaner) and Liquid Fire (a sulfuric acid-based drain cleaner). While Mr. Wofford was using Lewis Red Devil Lye, some of the contents of the drain boiled back out of the water onto his hand (5/2/91 Depo. D. Thomas, p. 74). Mr. Wofford then washed his hands and left to go home (5/2/91 Depo. D. Thomas, p. 75). Mr. Thomas never saw Lawton Wofford or any other person with any drain cleaner, other than Lewis Red Devil Lye (5/2/91 Depo. D. Thomas, p. 70). The only person whom Mr. Thomas saw placing drain cleaner into the drain system was Lawton Wofford (5/2/91 Depo. D. Thomas, p. 71). Mr. Thomas had no knowledge that any drain cleaner other than Lewis Red Devil Lye was purchased until well after his injury took place (5/2/91 Depo. D. Thomas, p. 79). Mr. Thomas did not know that Liquid Fire had been used in any drain (5/2/91 Depo. D. Thomas, p. 87). He had seen Mr. Wofford add only a little Lewis Red Devil Lye in the drain (5/2/91 Depo. D. Thomas, pp. 122, 123). Furthermore, neither label warned of the danger of explosion, or the dangers of explosion when mixing drain cleaners, by words or pictures, and thus did not put Mr. Thomas on notice to inquire about the presence of or use of other drain cleaners in the drain. (See Labels, R. 3-63-"Ex. B", R. 3-62 "Ex. A" – "Ex. B" is missing hang tag.)

On February 8, 1990, Mr. Thomas arrived at work at approximately 6:10 a.m. (5/2/91 Depo. D. Thomas, p. 89). The drain at issue appeared unclogged with only a little residue of water in it, thereby raising the inference that, despite the main line having been previously cut, the contents of the drain were still obviously leaching into the soil. He attempted to place approximately two and a

half tablespoons of Lewis Red Devil Lye into the floor drain. Since the can only contained two and a half tablespoons of lye at that time, be began to pour the contents directly from the can (5/2/91 Depo. D. Thomas, p. 90). He did not use the rest of the can since the contents of the floor drain exploded immediately as he started adding the Lewis Red Devil Lye (5/2/91 Depo. D. Thomas, p. 88). Mr. Thomas did not use Lewis Red Devil Lye contrary to the label directions, since he attempted to place approximately two and a half tablespoons of Lewis Red Devil Lye into the floor drain (5/2/91 Depo. D. Thomas, p. 90). The additional amount of Lewis Red Devil Lye added to the drain system was not contrary to the can's directions, since the directions call for a repeat application if the drain is still closed. (R. 3-63-"Ex. B".)

When the contents of the floor drain exploded back onto Mr. Thomas, it covered his face and head (5/2/91 Depo. D. Thomas, p. 88). In fact, the contents exploded back so quickly that Mr. Thomas did not have an opportunity to move the can (5/2/91 Depo. D. Thomas, p. 101). The force of the explosion was so strong that it blew the cap off his head and covered his head and face, even though he was standing straight up, holding the can at arm's length and had his face turned (5/2/91 Depo. D. Thomas, p. 103, 104).

Charles Blake, expert retained by Amazing Products, Inc., examined the residue on the walls and ceiling of the room where Mr. Thomas was blinded (Depo. Blake, p. 68 line 5). From the residue only minor amounts of sulfuric acid was found (Depo. Blake, p. 129 line 5). The explosion could have been caused by mixing Lewis Red Devil Lye with the drain water or by the mixing of both chemicals

in the drain (Depo. Blake, p. 137 line 17). The cause of the explosion could have had nothing to do with sulphuric acid in the drain (Depo. Blake, p. 157 line 6). The explosion was caused by sodium hydroxide (Red Devil Lye) being poured into the drain water (Depo. Blake, p. 70 line 13). (Depo. Blake, p. 72 line 8). The mixing of sodium hydroxide and sulphuric acid together would not cause an explosion (Depo. Blake, page 77 line 9). Further confusing matters, and clearly showing that fact question remain that only a jury can sort out, AHP and B-M's expert E. C. Ashby has also earlier testified it is impossible to prove or disprove Plaintiff's injuries were caused by one product or the other. (R. 1-30-"Ex. A".)

Neither product label warned that the product would explode if mixed into a drain system that contained another drain cleaner, and neither label had pictorials showing the possibility of explosion or contraindicating the mixing of drain cleaners. The hand tag missing from the Liquid Fire bottle had a pictorial regarding mixing, but was not designed to be adequately affixed to the bottle and was missing when purchased. If Lawton Wofford had known that the combination of Lewis Red Devil Lye and Liquid Fire was an explosive mixture, as set forth in the Affidavit of Dr. Ashby (R. 3-63-"Ex. D".) he would not have used the two drain cleaners together (R. 4-76-Affidavit Wofford, ¶ 10). Since the two drain cleaners were on the same display, he did not think twice when making his purchase, and did not question whether they could be used together (R. 4-76-Aff. Wofford, ¶ 14). Still worse, the Liquid Fire bottle which Lawton Wofford purchased did not have a hang tag with its pictorial warnings (R. 4-76-Aff. Wofford, ¶ 12). Further, neither he

nor Tony White, another Fieldale employee, knew that the two drain cleaners were explosive in nature (R. 4-76-Aff. White ¶ 8; Aff. Wofford ¶ 8).

Both Lewis Red Devil Lye and Liquid Fire were inadequately labeled, and this inadequacy led to this tragic incident. The use of both Lewis Red Devil Lye and Liquid Fire was foreseeable misuse (Depo. Abraham, p. 222). D. L. Thomas and others using the products could have been adequately warned through the use of pictorials to make it alarming to the user to ensure that they read the label or have it read to them (Depo. Tanyzer, pp. 157, 159). This would be more apt to place the user on notice that this was a dangerous product (Depo. Tanyzer, pp. 160, 162).

Mr. White thought that poison was the only hazard associated with the product, and thereby thought that the warning label itself was concerned simply with poison (R. 4-76-Aff. White, ¶ 9). The front label has nothing to indicate the danger of explosiveness to bring the user to a level of awareness of precisely what can happen (Depo. Tanyzer, p. 177). The efficiency of pictorial warnings is borne out by the fact that both White and Wofford knew that the contents were poisonous, so they obviously noted the pictorials. (R. 4-75-Aff. White, ¶ 9; Aff. Wofford, ¶ 9.)

Prior to his injury, Thomas' wife, Hazel Thomas, had read a LRDL label to him (5/2/91 Depo. of D. Thomas, p. 25). He knew not to use it with "hot water"; to use three tablespoons; and to keep his face away from the can and drain at all times (5/2/91 Depo. of D. Thomas, pp. 27, 31, 120, 145). He did not know that LRDL would explode back and burn his eyes and skin, since he does not

remember his wife ever telling him that LRDL could explosively blow back onto him (5/2/91 Depo. of D. Thomas, pp. 31, 144). If Mr. Thomas had been adequately warned about the explosive nature of LRDL, he would have taken proper safety precautions (R. 4-76-Aff. D. Thomas). In the past, he has followed such safety precautions (5/2/91 Depo. of D. Thomas, p. 118). However, Mr. Thomas was not apprised of the fact that Lewis Red Devil Lye could explode, and burn his eyes and skin as it did (5/2/91 Depo. D. Thomas p. 31), even though Ms. Thomas read the label to him, because the label contained no warning of explosion, either in words or, more importantly for the foreseeable illiterate user Mr. Thomas, in pictures or symbols. (R. 3-63-"Ex. B & C.")

There has been expert testimony in this case that the formulations of Lewis Red Devil Lye and Liquid Fire are defective, since a lower percentage of sodium hydroxide and sulfuric acid would perform the same function and be a much safer formulation. Therefore the formulations of these products are defective, and inherently dangerous, since, with today's technology, (as opposed to the technology of 1975), a safer formulation of chemical drain cleaner could be made to perform the same job, according to Dr. Carl Abraham. (See depo. of C. Abraham, p. 256-257.)

The labels on Lewis Red Devil Lye and Liquid Fire were inadequate and deficient in a myriad of ways, but most significantly for the purposes of this petition for writ of certiorari, the labels did not contain pictorial warnings to advise others that a product was already in the drain system, and neither label contained a pictorial warning of the explosive nature of the product.

B. PROCEDURAL HISTORY

As a result of D. L. Thomas' injuries, he filed a complaint and amended complaint, ultimately bringing in the three defendants presently before this court.

Each defendant moved for summary judgment, which was granted by the trial court. The trial court at page 12 of its opinion (13a) found that "[p]laintiff is functionally illiterate. Therefore, no matter how adequate the written warning is to the normal consumer, the warning would be ineffective as to Plaintiff." This finding is the basis for plaintiff's equal protection claim, and was timely and properly raised by your petitioners in their 11th Circuit brief and their contention that since an illiterate user is foreseeable, pictorial warnings should have been provided.

The basis for federal jurisdiction in the Northern District of Georgia was diversity. The trial court's further finding that Mr. Thomas was unaware of any other drain cleaner in the system and thus any deficiency in the defendants' products warning labels did not cause his injuries, (see Judge Forrester's order at page 16 (17a)) is also erroneous based on the fact that the drain system was at least leaching into the soil and thus appeared to be draining (see page 4). Further, the trial court ignored here the possibility that one chemical, the other, or both could have caused the explosion. (See pages 5-6). The 11th Circuit Court of Appeals affirmed that judgment per curiam (39 F.3d 325) (1a). The 11th Circuit Court of Appeals initially denied rehearing and suggestion of rehearing en banc on June 5, 1995 (58 F.3d 642) (5a) then recalled that order on June 15, 1995 (26a). It was in this recall of the

denial of the petition for rehearing that the Court requested briefs on the effect of *Banks v. ICI Americas*, 264 Ga. 732. Ultimately the 11th Circuit Court of Appeals denied the suggestion of rehearing or hearing en banc and appellants' petition for rehearing on February 9, 1996 (28a).

REASONS FOR GRANTING THE PETITION

1. There can not be a constitutionally valid judicial determination that illiteracy is a proper basis for denying petitioners' right to equal protection of the laws.

2. Petitioner has been deprived of his right to a trial if this Court of Appeals' determination of an issue of prospectivity or retroactivity, under *Banks v. ICI Americas, Inc.*, is determined without certifying the question to the Supreme Court of Georgia.

3. This 11th Circuit opinion conflicts with other 11th Circuit opinions based on similar facts.

The orderly administration of justice is frustrated and the integrity of the judicial system is potentially compromised, when Courts of Appeals, whether State or Federal, issue opinions without explanations, and issue opinions ignoring or overruling sub silentio controlling authority without either addressing or attempting to distinguish controlling authority, and without, in the case of the Federal Courts, presenting the issue to the court en banc to decide if it should be overruled.

I. THERE CAN NOT BE A CONSTITUTIONALLY VALID JUDICIAL DETERMINATION THAT ILLITERACY IS A PROPER BASIS FOR DENYING PETITIONERS' RIGHT TO EQUAL PROTECTION OF THE LAWS.

The trial court found in this case "it is imminently foreseeable that a user of either Lewis Red Devil Lye or Liquid Fire would be illiterate. See *Zigler v. E.I. Dupont de Numours & Co.*, 53 N.C. App. 147, 155-56, 280 S.E.2d 510, 516 (1981), *review denied*, 304 N.C. 393, 285 S.E.2d 838 (1981); *Power*, 149 Misc. 2d at 970, 568 N.Y.S. 2d at 676."

By granting summary judgment despite this, the trial court has effectively held that an illiterate user is not entitled to simple pictorial warnings of the dangers of the products he is using, and has therefore held that it is permissible under state products liability law, to create a class – those foreseeable illiterate users – against whom it is permissible to discriminate because of their disability.

Further, "[a]ll standards of equal protection applicable to the states through the Fourteenth Amendment are also applicable to the federal government through the Fifth Amendment . . . Although the equal protection guarantee is not specific, it has been implied into the Due Process Clause of the Fifth Amendment." (Citations omitted.) *Morris v. Richardson*, 348 F.Supp. 494, 499 (1972).

Thus, whether the class discrimination against the illiterate has been read into Georgia products liability law by a state or federal judge interpreting these statutes is immaterial. "The Due Process Clause of the Fifth Amendment prohibits the federal government from creating statutes which establish arbitrary discrimination having no

rational basis in legitimate governmental purposes." *Morris v. Richardson, supra.*

"[T]he Equal Protection Clause . . . 'announces a fundamental principle: the state must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle.' *New York City Transit Authority v. Beazer,* 440 U.S. 568, 587, 59 L. Ed. 2d 587, 99 S. Ct. 1355." *Jones v. Helms,* 452 U.S. 412, 423, 69 L. Ed. 2d 118, 128, 101 S. Ct. 2434, ___. Judge Forrester's interpretation of Georgia State law allowing unfair discrimination against the illiterate Mr. Thomas is clearly partial and applies differently to illiterate as opposed to literate users. Therefore the 11th Circuit's ruling and order must be reversed, inasmuch as it does not apply Georgia product liability law "evenhandedly to all persons within the jurisdiction."

II. PETITIONER HAS BEEN DEPRIVED OF HIS RIGHT TO A TRIAL IF THIS COURT OF APPEALS' DETERMINATION OF AN ISSUE OF PROSPECTIVITY OR RETROACTIVITY, UNDER *BANKS V. ICI AMERICAS, INC.*, IS DETERMINED WITHOUT CERTIFYING THE QUESTION TO THE SUPREME COURT OF GEORGIA.

The 11th Circuit Court of Appeals has concluded that *Banks v. ICI,* 264 Ga. 732 (450 S.E.2d 671) would not apply to the injuries involved in this case, based on a footnote in *ICI v. Banks,* 218 Ga. 237 (460 S.E.2d 797, 798 n.1). The Georgia Supreme Court in *Banks v. ICI,* adopted a risk-utility analysis balancing test which would moot even the trial court's erroneous factual determinations in this case,

if under a risk-utility analysis, a jury determined that the use of these chemicals for the purpose intended was inherently dangerous, and they should not have been marketed or sold for this application in the first place.

As footnote one implicitly notes, the Supreme Court of Georgia has yet to make any analysis under *Flewellen v. Atlanta Casualty Company,* 250 Ga. 709, 712 (300 S.E.2d 673) with regard to retroactivity, and the only retroactivity issue decided was in *favor* of retroactivity, as to *Banks v. ICI* itself. Further cited in the pertinent footnote is *General Motors Corp. v. Rasmussen,* 255 Ga. 544, 545-546 (340 S.E.2d 586) (1986) noting that retroactive application of judicial decisions in civil cases is the *usual* rule, though a law changing decision will generally be applied prospectively under the *Flewellen* test. However, this is "where the decision changes established law, and prospective application would avoid imposing 'injustice or hardship' on those who justifiably relied on the prior rule, without unduly impairing the 'purpose and effect' of the new rule." As the Court of Appeals has noted, none of this analysis has taken place in the Georgia Supreme Court with regard to *Banks v. ICI* and its new rule, and petitioners suggested that rather than concluding that *Banks v. ICI* would not apply to the injuries involved in this case based on a footnote in the Georgia Court of Appeals, that the 11th Circuit instead certify the question of retroactivity and its application in this case, to the Georgia Supreme Court, where this issue could be best and most fully addressed. See *Tolbert v. Murell,* 253 Ga. 566 (322 S.E.2d 487) (1984), as well as *Rasmussen.* The Supreme Court of Georgia in *Banks v. ICI Americas* adopted a risk-utility analysis balancing test, concluding

"that the better approach is to evaluate design defectiveness under a test balancing the risks inherent in a product design against the utility of the product so designed." *Banks v. ICI* at page 735. Petitioners have contended that the use of pure or near 100% concentrated chemicals in these products was an unsafe formulation, and that in the face of expert testimony in this case that there are safer formulations of both chemicals involved in this case, it should be a jury question as to whether the near pure concentrations of the volatile chemicals involved in the case were therefore inherently dangerous, inasmuch as expert testimony has determined that it is unnecessary to use such strong concentrations to achieve the result intended. (See page 8.) Even prior to the Georgia Supreme Court's opinion in *Banks v. ICI Americas*, your petitioners in their suggestion of rehearing (or hearing) en banc and appellants' petition for rehearing suggested to the 11th Circuit that this very question be forwarded to the Georgia Supreme Court on a certified question as to whether or not *Center Chemical Co. v. Parzini*, 234 Ga. 868 (218 S.E.2d 580) (1975) would still be valid law 20 years later, when expert testimony revealed that there were safer than pure formulations of both chemicals. Petitioners feel that this question was answered in favor of petitioners less than one month after petitioners requested that the case be sent to the Georgia Supreme Court to be answered, when *Banks v. ICI Americas* was decided on December 5, 1994.

Petitioners suggest that the 11th Circuit should have thereafter sent this case to the Georgia Supreme Court on the retroactivity question referenced in the 11th Circuit's final order in this case, inasmuch as it should be the State

of Georgia Supreme Court where the issue of retroactivity could be best and most fully addressed. Petitioners therefore ask for the writ of certiorari to issue here to reverse the 11th Circuit decision in this case, and certify the retroactivity question to the Georgia Supreme Court for a definitive analysis and decision. In the alternative, petitioners request that this court directly certify this question to the Georgia Supreme Court for decision.

III. THIS 11TH CIRCUIT OPINION CONFLICTS WITH OTHER 11TH CIRCUIT OPINIONS BASED ON SIMILAR FACTS.

The general rule in Georgia is that the adequacy of the warning is an issue for the jury. *Watson v. Uniden Corporation of America*, 775 F.2d 1514. "Whether adequate efforts were made to communicate a warning to the ultimate user and whether the warning if communicated was adequate are uniformly held questions for the jury." *Stapleton v. Kawasaki Heavy Industries*, 608 F.2d 571. This is still clearly the law and clearly the binding precedent in the 11th Circuit and should be applied in this case.

Comparing the facts in *Watson v. Uniden* to the facts in the present case illustrates clearly why Mr. Thomas should go before a jury on his facts. Unlike Mr. Thomas, who was not adequately warned due to the lack of any pictorial warning on either of these products showing that it would explode, Shirley J. Watson got to a jury on her negligent failure to provide a warning claim, regarding a wireless phone set, despite the fact that she and her husband *read the instruction book* that went with the phone, her husband *explained the "stand-by/talk" switch*

procedure to his wife when he installed the phone, the handset *itself* had a sticker on its inside face which read *"CAUTION – LOUD RING.* Move switch to talk position before holding receiver to the ear", and finally Mrs. Watson *knew* she was supposed to move the switch when she answered the phone, but *simply forgot to do so.* Despite all of this, Shirley J. Watson got to a jury on her claim that there were inadequate warnings and that Uniden was responsible for her permanent hearing impairment, despite admitting she knew what she was supposed to do, having read the instructions, having had the procedure explained to her, the handset having a sticker right on it, and Ms. Watson admitting that she knew what she was supposed to do, but forgot to do so.

It was the task of the 11th Circuit *en banc* to depart from the binding precedents in this circuit of *Watson v. Uniden Corporation of America,* 775 F.2d 151 (11th Cir. 1985) (appeal from M.D. Ga.); *Rhodes v. Interstate Battery System of America,* 722 F.2d 1517 (11th Cir. 1984); *Stapleton v. Kawasaki,* 608 F.2d 571, 573 (1979), *modified on other grounds,* 612 F.2d 905 (5th Cir. 1980). Therefore if those cases were no longer binding precedent in the 11th Circuit, this should have been so declared by a full court, not by a panel without opinion. If a plaintiff as *admittedly* thoroughly warned as Shirley Watson gets her constitutionally provided day in court before a jury, so must Mr. Thomas, who was using a product with inadequate warnings, inadequately communicated.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review and reverse the judgment below. As to section II, petitioners request that this court either reverse and direct the 11th Circuit to certify the *Banks v. ICI* retroactivity question to the Georgia Supreme Court, or that this Court so certify that question directly to the Georgia Supreme Court.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9214

D. C. Docket No. 1:91-00100-CV-JOF

D. L. THOMAS;
HAZEL THOMAS,

Plaintiffs-Appellants,

versus

AMERICAN HOME PRODUCTS, INC.;
BOYLE-MIDWAY, INC.;
AMAZING PRODUCTS, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(October 19, 1994)

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Eleventh Circuit Rule 36-1.

"Costs taxed against plaintiffs-appellants."

Judgment Entered: October 19, 1994
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

D. L. THOMAS and HAZEL THOMAS,	:	
Plaintiffs,	:	CIVIL ACTION NO. 1:91-CV-0100-JOF
vs.	:	
AMERICAN HOME PRODUCTS CORPORATION, et al.,	:	
Defendants.	:	

ORDER

(Filed 9-30-93)

This personal injury product liability action, sounding in negligence and strict liability, contends that Defendants' defective products were the proximate cause of an accident resulting in personal injuries and permanent blindness to Plaintiff D.L. Thomas. Mr. Thomas's injuries occurred after a violent eruption resulted from pouring Lewis Red Devil Lye into a drain system in order to unclog that system. Defendant Boyle-Midway, Inc., is the manufacturer of Lewis Red Devil Lye. At the time the injury to Plaintiff Thomas occurred, Boyle-Midway was the wholly-owned subsidiary of Defendant American Home Products Corporation. Defendant Amazing Products, Inc., is the manufacturer of another drain cleaner called Liquid Fire, which was also used in the attempt to unclog the drain system on the afternoon prior to the injury to Thomas. Plaintiff contends that Defendants' products were defective because they did not adequately

warn of the potential for serious violent eruption or explosion of their drain cleaners if mixed. Furthermore, Plaintiff argues that Defendants' products are inherently dangerous and defective as sold directly to the consumer public.

For the following reason, the court finds that summary judgment is appropriately granted to the Defendants as to all of Plaintiff's claims. Plaintiff's failure to warn claim fails because Plaintiff cannot show that any deficiency in the warning or means of communicating that warning were the proximate cause of Plaintiff's injuries, given that Plaintiff was illiterate and unaware that another potentially dangerous drain cleaner had been used in the drain system that Plaintiff was attempting to unclog. Plaintiff's ultrahazardous nature of products claim is barred by prior Georgia precedent holding that where adequate warnings are given, these products are not inherently dangerous and unfit for public use. Plaintiff's breach of warranty claims fail for lack of privity between the Plaintiff and the Defendants.

I. BACKGROUND

In the early morning of February 8, 1990, Plaintiff Thomas poured Lewis Red Devil Lye directly from the product's can into a clogged floor drain. The drain was located in a commercial building in Clarkeville, Georgia, owned by Fieldale Farms Corporation, Thomas's employer. The contents of the floor drain blew back into Thomas's face as he was pouring Lewis Red Devil Lye into the drain. As a result of this incident, Mr. Thomas

suffered serious burns to his face and was permanently blinded.

The drain system contained a floor drain, a shower drain, and a stand pipe drain, all approximately three to four feet apart from one another. These three drains connected together into one central pipe under the floor, and then drained outside the building. Years prior to Plaintiff's injury, when a ditch was being dug outside the building, the central drain pipe had been severed and permanently plugged with dirt when the ditch was backfilled. Plaintiff and the other Fieldale workers attempting to unclog the drains were unaware that the central pipe had been cut and permanently plugged outside the building.

The Lewis Red Devil Lye and Liquid Fire drain cleaners used in an attempt to unclog the drain system were purchased by Mr. J. Lawton Wofford, a Fieldale employee, at a local hardware store the afternoon before the injury to Thomas. Wofford purchased two twelve-ounce cans of Lewis Red Devil Lye and one gallon container of Liquid Fire. Lewis Red Devil Lye consists of 100% sodium hydroxide, better known as lye. Liquid Fire is composed of approximately 96% concentrated sulfuric acid. It is a fundamental chemical principle that the combining of sodium hydroxide, a base, with sulfuric acid, an acid, creates an extremely explosive mixture which, in a closed environment such as a drain, can cause the contents of the drain to "blow back" or erupt in a potentially violent reaction.

On February 7, 1990, at approximately 2:15 p.m., significant amounts of Lewis Red Devil Lye and Liquid

Fire were added to the three drains.[1] Mr. Thomas was completely unaware that Liquid Fire had been purchased or used in an attempt to unclog the drain system. Neither Wofford nor Thomas nor White read the warning labels on either of the Lewis Red Devil Lye or Liquid Fire products prior to using them on the drain system. On February 8, 1990, at approximately 6:20 a.m., Plaintiff Thomas poured the remainder of a can of Lewis Red Devil Lye into the floor drain at the Fieldale Building.[2] Immediately upon adding the Lewis Red Devil Lye to the floor drain, a violent reaction occurred.

Plaintiff Thomas did not read the Lewis Red Devil Lye warning labels or directions prior to using the product in the drain system. Mr. Thomas was functionally illiterate with only a third grade education at the time of the injury. Plaintiff could not write any words other than

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[1] Plaintiff Thomas states in his deposition testimony that he never saw Liquid Fire being added to the drain system, nor was he aware that Liquid Fire had been purchased to be used in unclogging the drain system. The deposition testimony of John Lawton Wofford indicates that both Tony White and D.L. Thomas were standing next to Wofford as he placed the Lewis Red Devil Lye and the Liquid Fire into the drain system. For summary judgment purposes the court will assume that Thomas was unaware of the Liquid Fire being added to the drain system because of Plaintiff's uncontradicted direct testimony that he was aware that Liquid Fire had been added to the drain system.

[2] Plaintiff believed that there were approximately two and a half tablespoons of Lewis Red Devil Lye remaining in the can when he started pouring the product into the drain directly from the can without measuring the amount of product added immediately prior to his injury. The exact amount of lye remaining in the can is unknown.

his name and could only recognize a small number of words, being unable to read a normal newspaper, magazine or letter. In addition, at no point on the day prior to Plaintiff's injury or on the morning of Plaintiff's injury, did either the Plaintiff or his co-workers read the label warnings or directions on either of the cans of Lewis Red Devil Lye or the container of Liquid Fire.

Prior to the accident at issue, Plaintiff had used Lewis Red Devil Lye approximately six times. Plaintiff had not read the warning label on the cans on any of these prior occasions, nor did he ask anyone to read the label to him. Plaintiff had, however, gotten his wife to read him the label of Lewis Red Devil Lye on one occasion approximately three years prior to his injury. Thomas could not recall whether his wife read the product's warning label or just the instructions as to how much lye was to be used in any given application. Thomas specifically remembered the amount of product to use in any single application, not to use Lewis Red Devil Lye with hot water, and to keep his face away from the can and the drain at all times when using Lewis Red Devil Lye. Thomas did not recall being informed that the product was poisonous, that it should not be used with other chemicals or drain cleaners, that protective gear should be warn [sic] when using the product, that if the product was not used properly it might splash back onto the user, or that the product could burn the user's skin and eyes. With regard to the use of other drain cleaners or the mixture of drain cleaners, Plaintiff did know that it was unsafe to mix Saniflush and Draino, but he did not know why it was unsafe, nor did he know how he was aware that it was unsafe to mix these products. In his

deposition testimony, Thomas stated that he knew not to use other chemicals with Lewis Red Devil Lye. Thomas was never directly asked, nor did he indicate, whether he was aware that it was dangerous to mix Liquid Fire with Lewis Red Devil Lye. Plaintiff further stated that he was aware prior to the time of his injury that a person using chemicals should carefully follow the directions in order to avoid injury.

Dr. E.C. Ashby, a Regent Professor of Chemistry at the Georgia Institute of Technology, performed a series of tests on the drain blow-back residue. Dr. Ashby's analysis established that the drain residue was made principally of sodium sulphate. Sodium sulphate is formed when sodium hydroxide, found in Lewis Red Devil Lye, is mixed with sulfuric acid, found in Liquid Fire. In addition, the residue contained unmixed sodium hydroxide, found in Lewis Red Devil Lye. The expert testimony of Dr. Ashby indicates that a mixture of sulfuric acid with sodium hydroxide in a drain with water present would likely cause a blow back of the magnitude which occurred in this instance.

The warning label of Lewis Red Devil Lye was changed in 1989. Although it cannot be definitively proven which label was on the Lewis Red Devil Lye at the time the injury occurred because the cans of product were thrown out subsequent to the injury, the record indicates that the Habersham Hardware and Home Center, where the Lewis Red Devil Lye and Liquid Fire were purchased, had not purchased Lewis Red Devil Lye at any time in 1989 through February of 1990. Therefore, for purposes of this summary judgment motion, the court will assume that the Lewis Red Devil Lye in question contained the

1986 warning label. Both parties contend or admit, respectively, that the 1989 warning label provides a better overall warning, although Defendants strenuously contest any implication that the 1986 label is in any way deficient or defective.

II. DISCUSSION

Plaintiff Thomas brings a five count amended complaint. Count one asserts a product liability claim sounding in negligence against American Home Products, Inc., Boyle-Midway, and Amazing Products, Inc., for Defendants' failure to provide proper and adequate warning of their products' inherently dangerous propensities. Count two is a breach of warranty claim alleging that Defendants American Home Products Corp., Boyle-Midway, and Amazing Products breached the implied warranty of merchantability and implied warranty of fitness with respect to their products. Count three is a strict liability claim alleging that American Home Products, Inc., Boyle-Midway and Amazing Products marketed a defective product either in its manufacture, packaging or the failure to warn adequately of the product's dangerous propensities. Count four seeks punitive damages against Defendants American Home Products Corp. and Boyle-Midway because of their actual notice of similar injuries involving Lewis Red Devil Lye that occurred prior to the injury of Thomas. Plaintiff also seeks punitive damages against Defendant Amazing Products for its constructive notice that its product is inherently dangerous. Count five seeks loss of consortium on behalf of Plaintiff Hazel Thomas against Defendants because of Mr. Thomas's permanent injuries.

Defendants have moved for summary judgment as to all of Plaintiffs' claims on various grounds.[3] Currently pending before the court are three motions for summary judgment filed by the Defendants. Defendant Amazing Products argues that it has no duty to warn Plaintiff about the dangerous propensities of its product because Plaintiff never used Liquid Fire. Furthermore, Amazing Products alleges that the presence of Liquid Fire in the drain system was not the proximate cause of Plaintiff's injury. Defendants American Home Products and Boyle-Midway contend that Plaintiff's failure to warn claims, whether under a negligence theory or strict liability theory, fail because Thomas failed to read the warning label provided on the Lewis Red Devil Lye prior to use and,

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[3] Fed. R. Civ. P. 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of every element essential to the party's case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986); *Brown v. City of Clewiston*, 848 F.2d 1534, 1536 (11th Cir. 1988). Once the movant carries his burden of asserting the basis for his motion, *see Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553, the non-moving party is then required "to go beyond the pleadings" and present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Id.* at 324, 106 S. Ct. at 2553. To survive a motion for summary judgment, the non-moving party must come forward with specific evidence of *every* element material to his case so as to create a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. at 2552 ("there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial"); *Brown*, 848 F.2d at 1537.

therefore, cannot establish the requisite causation element. Plaintiffs' other allegations of product defect relating to the ultrahazardous danger of Lewis Red Devil Lye are essentially contested under the theory that Defendants are under no duty to provide a completely safe product, merely a product that if used properly (i.e., complying with all warnings and directions) does not provide an unreasonable danger to ultimate consumers.

All three Defendants contend that their respective products are not defective and provide adequate warnings as a matter of law. Furthermore, all three Defendants contend that Plaintiffs' breach of warranty claims are barred for lack of privity. In addition, Defendant American Home Products Corp. seeks summary judgment, alleging that it is not a proper party to this lawsuit because it never manufactured, marketed or distributed Lewis Red Devil Lye. These functions were performed solely by Boyle-Midway, Inc., and Boyle-Midway Household Products, Inc., wholly owned subsidiaries of American Home Products. Defendant American Home Products contends that there is no legal or evidentiary basis to support the piercing of Boyle-Midway's corporate form in order for liability to attach to American Home Products. Finally, Defendants American Home Products and Boyle-Midway contend that there is no evidentiary basis on which to support a claim for punitive damages.

A. Alleged Failure to Provide Adequate Warnings

The key issue in this dispute is Plaintiffs' allegations that Defendants failed to meet their obligations of

adequately warning Mr. Thomas of the dangers associated with the use of Defendants' products.

Under Georgia law, the failure to meet a duty to warn is actionable under both a negligence and a strict liability theory.[4] *Rhodes v. Interstate Battery System of America*, 722 F.2d 1517, 1518-19 (11th Cir. 1984); *White v. W.G.M. Safety Corp.*, 707 F. Supp. 544, 546 (S.D. Ga. 1988), *aff'd*, 891 F.2d 906 (11th Cir. 1989) ("[u]nder Georgia law a manufacturer may be liable under both negligence and strict liability"); *McCurley v. Whitaker Oil Co.*, 193 Ga. App. 527, 528, 338 S.E.2d 412, 414 (1989) (breach of a duty to warn provides separate theories of recovery for negligence, strict liability, and recklessness). The duty to warn may be breached in two ways: (1) by failing to provide an adequate warning of the product's potential risk and inherent dangers, or (2) by failing to provide an adequate means to communicate the warning to the ultimate user. *Rhodes*, 722 F.2d at 1519 (applying Georgia law) (citing *Stapleton v. Kawasaki Heavy Indus., Ltd.*, 608 F.2d 571, 573 (5th Cir. 1979), *modified on other grounds*, 612 F.2d 905 (5th Cir. 1980)). In this case, Plaintiff Thomas alleges that Defendants have failed to meet their duty to warn both because the warnings are deficient and because the means of communicating the warnings were inadequate.

The duty to warn requires a manufacturer to warn of any non-obvious or non-known perils or dangers which

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[4] Georgia law applies to this action because where jurisdiction is founded upon diversity of citizenship, the law of the forum state applies. *See* 28 U.S.C. § 1332; *Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1519 n.3 (11th Cir. 1988).

the manufacturer has reason to anticipate may result from the use of its product. *Foskey v. Clark Equipment Co.*, 715 F. Supp. 1088, 1090, 1091 (M.D. Ga. 1989), *aff'd without opinion*, 914 F.2d 269 (11th Cir. 1990).[5] "Whether a duty to warn exists thus depends upon foreseeability of the use in question, the type of danger involved, and the foreseeability of the user's knowledge of the danger." *McCurley*, 193 Ga. App. at 528, 388 S.E.2d at 414 (quoting *Giordano v. Ford Motor Co.*, 165 Ga. App. 644, 645 (2), 299 S.E.2d 897 (1983)). "Whether adequate efforts were made to communicate a warning to the ultimate user and whether the warning if communicated was adequate are uniformly held questions for the jury." *Stapleton*, 608 F.2d at 573, *cited in Rhodes*, 722 F.2d at 1519, and *Watson v. Uniden Corp. of America*, 775 F.2d at 1516 (11th Cir. 1985). Nonetheless, "in plain, palpable and indisputable cases, . . . [where] reasonable minds cannot differ as to the conclusions to be reached," summary judgment is appropriate. *Watson*, 775 F.2d at 1516 (citing *Hercules, Inc. v. Lewis*, 168 Ga. App. 688, 689, 309 S.E.2d 865 (1983), citing *Williams v. Kennedy*, 240 Ga. 163, 163, 240 S.E.2d 51 (1977)); *see Pruitt v. P.P.G. Industry, Inc.*, 895 F.2d 734, 736 (11th Cir. 1990) (warning adequate as a matter of law) (per curiam); *Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1520 (11th Cir. 1988) (affirming summary judgment); *Hall v. Scott USA, Ltd.*, 198 Ga. App. 197, 200-01, 400 S.E.2d 700 (1990) (affirming summary judgment); *Copeland v. Ashland Oil, Inc.*, 188 Ga. App. 537, 538-39, 373

[5] This duty also includes the duty to warn of latent defects. *Id.*

S.E.2d 629 (1988) (holding warning adequate as a matter of law).

Plaintiffs allege that Defendants' drain cleaner products failed to warn adequately of the products' likelihood to react violently or explode when mixed. Plaintiffs argue that the existing language on the warning labels is deficient because it does not describe the explosive effect that results from the mixing of the products, nor are the contents of the label presented in such a format as the user would be immediately informed of the hazardous nature of the product. Furthermore, Plaintiffs contend that Defendants should have used additional pictorials to warn of their products' propensity to explode when mixed.

1. Written Warning

To the extent Defendants have failed to provide an adequate written warning on their products, and thereby breached their duty to warn an ultimate user of foreseeable dangers, the court finds that Plaintiffs' negligence and strict liability claims fail because Plaintiff cannot establish that the failure to provide an adequate warning caused his injury under the circumstances present. The undisputed facts show that Plaintiff is functionally illiterate. Therefore, no matter how adequate the written warning is to the normal consumer, the warning would be ineffective as to Plaintiff. Furthermore, because Lewis Red Devil Lye's warning labels and Liquid Fire's labels specifically warn against using their product in conjunction with any other drain cleaners or chemicals in order to prevent dangerous reactions likely to result in a violent

eruption, the court finds Defendants' written warnings adequate as a matter of law. *See, e.g., Pruitt,* 895 F.2d at 736.

Pursuant to the Restatement (Second) of Torts, followed by Georgia, "[w]here a warning is given, the seller may reasonably assume that it will be read and heeded." Restatement (Second) of Torts, § 402A, comment J. This language has been interpreted to create a presumption that where an adequate warning exists, it would have been read and followed, thereby favoring the manufacturer, and where the product contains no warning, a presumption is created that the user would have read an adequate warning had it been present, favoring the user. *Reyes v. Wyeth Laboratories,* 498 F.2d 1264, 1280-82 (5th Cir.), *cert. denied,* 419 U.S. 1096, 95 S. Ct. 687 (1974) (applying Texas law); *Technical Chemical Co. v. Jacobs,* 480 S.W.2d 602, 606 (Tex. 1972); *see Hawkins v. Richardson-Merrell, Inc.,* 147 Ga. App. 481, 483, 249 S.E.2d 286, 288 (1976) (citing *Reyes* with favor).[6] The presumption that

[6] This presumption analysis concerning warnings as derived from the Restatement (Second) of Torts, § 402A, comment J, has been followed and applied by numerous courts. *See Thomas v. Hoffman-LaRoche, Inc.,* 949 F.2d 806, 812-14 (5th Cir. 1992) (applying Mississippi law); *Knowlton v. Deseret Medical, Inc.,* 930 F.2d 116, 123 (1st Cir. 1991) (applying Massachusetts law); *Hermes v. Pfizer, Inc.,* 848 F.2d 66, 70 n.20 (5th Cir. 1988) (applying Mississippi law); *Petty v. United States,* 679 F.2d 719, 729 n.9 (8th Cir. 1982) (applying Iowa law); *Snawder v. Cohen,* 749 F. Supp. 1473, 1479-80 (W.D. Ky. 1990) (applying Kentucky law); *Walsh v. Ford Motor Co.,* 106 F.R.D. 378, 401 (D.D.C. 1985); *Petty v. United States,* 592 F. Supp. 687, 690-92 (N.D. Iowa 1983) (applying Iowa law); *Eagle-Picher Indus., Inc. v. Balbos,* 326 Md. 179, 604 A.2d 445, 468-69 (1992); *Magro v. Ragsdale Bros., Inc.,* 721 S.W.2d 832, 834 (Tex. 1986); *Wooderson v. Ortho Pharmaceutical Corp.,* 235 Kan. 387, 681 P.2d 1038, 1057, *cert. denied,* 469 U.S. 965, 105 S. Ct. 365 (1984); *Coffman v. Keene Corp.,* 608 A.2d 416, 419-22 (N.J. Super. A.D. 1992) (citing cases); *Seley v. G.D. Searle & Co.,* 67 Ohio St. 2d 192, 423 N.E.2d 831, 838 (1981).

the user would have read an adequate warning can be rebutted, however, if the manufacturer provides evidence that the user would nonetheless have not read the warning. *Reyes,* 498 F.2d at 1281; *Jacobs,* 480 S.W.2d at 606. Evidence sufficient to rebut this presumption includes the fact that the user was "blind, illiterate, intoxicated at the time of the product's use, irresponsible, lax in judgment, or by some other circumstance tending to show that the improper use would have occurred regardless of the proposed warnings or instructions." *Magro,* 721 S.W.2d at 834; *Coffman,* 608 A.2d at 420. Therefore, even assuming for the sake of argument that Defendants' warning labels were found to be deficient or inadequate, thereby establishing a presumption that Plaintiff would have read an adequate warning, Thomas's illiteracy rebuts this presumption and precludes a finding of causation. *See Power v. Crown Controls Corp.,* 149 Misc.2d 967, 968, 568 N.Y.S.2d 674, 675 (N.Y. Sup. 1990) ("The presumption that a user would have heeded warnings can be rebutted by proof that an adequate warning would have been futile since plaintiff would not have read it.").

2. Means of Communicating Warning

Nevertheless, a finding that a particular warning was adequate as a matter of law, *or that a plaintiff did not or could not read the warning at issue does not prevent recovery*

under a failure to warn theory in all cases. See Rhodes, 722 F.2d at 1519. The plaintiff may still challenge "the adequacy of the efforts of the manufacturer or seller to communicate the dangers of the product to the buyer or user." *Id.* (citing *Stapleton*, 608 F.2d at 573). In the instant action Plaintiff Thomas contends that Defendants' means of communicating their warning was inadequate because of their failure to use additional pictorials on the label. Specifically, Plaintiffs allege that Defendants should have added a pictorial showing the explosive nature of Defendants' products.

Initially, the court finds that it is imminently foreseeable that a user of either Lewis Red Devil Lye or Liquid Fire would be illiterate. *See Zigler v. E. I. Du Punt de Nemours & Co.*, 53 N.C. App. 147, 155-56, 280 S.E.2d 510, 516 (1981), *review denied*, 304 N.C. 393, 285 S.E.2d 838 (1981); *Power*, 149 Misc.2d at 970, 568 N.Y.S.2d at 676. Additionally, the court notes that a pictorial warning against the mixing of drain cleaners would be possible simply by showing two bottles with liquid pouring out above a funnel, representing a drain, with a circle and a crossbar through it. Therefore, the court finds that Thomas has provided a reasonable basis to support a failure to warn claim based upon Defendants' failure to provide additional pictorial warnings reasonably likely to apprise him of their products' dangerous qualities sufficient. *See Rhodes*, 722 F.2d at 1520.

Notwithstanding a valid failure to warn claim, summary judgment is appropriate for the Defendants in this instance based on the facts present, because Plaintiff cannot show that any deficiency in Defendants' warnings

was the proximate cause of Plaintiff's injuries. The undisputed evidence establishes that Thomas was unaware prior to his using Lewis Red Devil Lye when he was injured that Liquid Fire (i.e., sulfuric acid) had been added to the building's drain system. Therefore, any additional pictorial warnings concerning the explosive nature of the products or prohibiting the mixing of drain cleaners would be futile because the warnings alone would not put Thomas on notice of the potential danger he faced by adding Lewis Red Devil Lye to the drain system in question. The simple facts are that Thomas did not know that the drain system was blocked, preventing the escape of any added materials or chemicals, nor was he aware that any drain cleaner other than Liquid Fire had been added to the drain system. Thus, any deficiency in the Defendants' products' warning labels did not cause Plaintiff Thomas's injuries. His injuries were caused by unknown third-party acts and unforeseeable consequences.

3. Work Place Communication Theory

Plaintiffs impliedly attempt to create a dispute of material fact as to the causation element under their failure to warn claims through the affidavit testimony of Thomas's co-workers indicating that had they been adequately warned of Defendants' products' propensity to explode when mixed, they would have in turn warned Plaintiff of this danger and the fact that they had used both cleaners in the drain system. This information would have forewarned Plaintiff not to add Lewis Red

Devil Lye to the drain system or to take additional precautions, which in turn would have prevented his injury. Plaintiffs have provided no authority in support of this theory, and, frankly, the court does not believe that this provides a reasonable basis to preclude summary judgment for the Defendants. Nonetheless, a review of the case law indicates that there is some non-binding precedent which supports a work-place communication theory to establish causation in a failure to warn situation. *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1538-39 (D.C. Cir.), *cert. denied*, 469 U.S. 1062, 105 S. Ct. 545 (1984); *Power*, 149 Misc.2d at 970, 568 N.Y.S.2d at 676. The basis for this theory is that in an organized society, the realities of society trump traditional common-law limitations on an actor's duty because product warnings are typically disseminated through work place communications from supervisors to workers. *Ferebee*, 736 F.2d at 1539. Therefore, any failure adequately to warn the injured user's co-workers or supervisors could establish causation, because arguably the informed co-worker would have warned the injured user. *Id.*

Initially, the court finds that Georgia product liability law would not support a worker's communication theory to establish proximate cause, but rather would follow traditional common law limitations requiring a user to accept some responsibility for his actions and read the warning labels of products prior to use. *See Center Chemical Co. v. Parzini*, 234 Ga. 868, 869-70, 218 S.E.2d 580 (1975); Restatement (Second) of Torts, § 402A, comments H & J. Furthermore, even assuming this theory would be

followed in Georgia, Plaintiffs cannot meet the requirements of the theory necessary to imply causation. The co-worker's communication theory requires "that *someone* in the work place have read the label." *Ferebee*, 736 F.2d at 1539. The co-worker's reading of the warning label replaces or fulfills the user's duty to read the label in order to establish causation. *Id.* In this instance, the undisputed facts show that neither Thomas, Tony White, nor John Lawton Wofford read the warning label on either the Lewis Red Devil Lye or Liquid Fire. Furthermore, unlike Thomas, there is no evidence indicating that either White or Wofford was illiterate or otherwise unable to read the labels prior to use. Therefore, the court finds that the work place communication theory is inapplicable to this case, and Plaintiff cannot establish that any alleged deficiency in Defendants' warnings was the proximate cause of his injuries.

B. Ultrahazardous Nature of Products

The court finds that all of Plaintiffs' other arguments and theories of recovery relate directly to their theory that sodium hydroxide and sulfuric acid are of such an ultrahazardous nature that they are unable to be made safe through adequate warnings for use by the consuming public. The ultrahazardous nature of these products has already been addressed by the Georgia courts, which found that where adequate warnings are provided, they can reasonably be used safely by the consuming public. *See Parzini*, 234 Ga. at 870-71; *Lang v. Federated Department Stores, Inc.*, 161 Ga. App. 760, 761, 287 S.E.2d 729 (1982). Therefore, these claims are precluded.

C. Breach of Warranty Claim

Defendants argue that Plaintiffs' breach of warranty claims are barred because no privity exists between Defendants and Plaintiffs. Plaintiffs admit that there is generally no implied warranty between a manufacturer and an ultimate consumer, but rather rely on an exception to the general rule which provides that no privity is required where a product is "dangerous in nature" or "imminently dangerous." *Beam v. Omark Industries, Inc.*, 143 Ga. App. 142, 146, 237 S.E.2d 607 (1977). This exception, however, is not applicable because as already discussed, Defendants' drain cleaner products are not "imminently dangerous." Lewis Red Devil Lye and Liquid Fire are only dangerous if not used properly according to the directions and warnings provided. Therefore, the court finds that the general privity requirement applies, and Plaintiffs' breach of warranty claims are barred. *See Morgan v. Mar-Bel, Inc.*, 614 F. Supp. 438, 441 (N.D. Ga. 1985); *Lamb v. Georgia-Pacific Corporation*, 194 Ga. App. 848, 850, 392 S.E.2d 307 (1990); *Stewart*, 131 Ga. App. 747, 751-52, 206 S.E.2d 857 (1974), *aff'd*, 233 Ga. 578, 212 S.E.2d 337 (1975).

III. CONCLUSION

Having found that Plaintiffs cannot establish that any deficiency in the warning labels of Defendants' products was the proximate cause of Plaintiff's injury and that no privity exists between Plaintiffs and Defendants, the court finds no basis to support Plaintiffs' claims as a matter of law. Therefore, Defendant Amazing Products'

motion for summary judgment [62-1], Defendants American Home Products Corp. and Boyle-Midway, Inc.'s motion for summary judgment [63-1], and Defendant American Home Products' motion for summary judgment [64-1] are GRANTED.

SO ORDERED, this 29th day of September, 1993.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

D. L. THOMAS and HAZEL THOMAS, Plaintiffs,	:	CIVIL ACTION NO. 1:91-CV-0100-JOF
vs.	:	
AMERICAN HOME PRODUCTS CORPORATION, et al., Defendants.	:	

AMENDED ORDER

(Filed Oct. 8, 1993)

The court hereby AMENDS its order in the above-captioned case, filed September 30, 1993, to reflect the following.

The sentence on page four, footnote one, line seven, should read: For summary judgment purposes the court will assume that Thomas was unaware of the Liquid Fire being added to the drain system because of Plaintiff's uncontradicted, direct testimony that he was unaware that Liquid Fire had been added to the drain system.

The sentence on page sixteen, paragraph one, line six, should read: The simple facts are that Thomas did not know that the drain system was blocked, preventing the escape of any added materials or chemicals, nor was he aware that any drain cleaner other than Lewis Red Devil Lye had been added to the drain system.

In all other respects the order of September 30, 1993, shall remain the same.

SO ORDERED, this 8th day of October, 1993.

/s/ J. Owen Forrester
J. OWEN FORRESTER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9214

D. L. THOMAS;
HAZEL THOMAS,

Plaintiffs-Appellants,

versus

AMERICAN HOME PRODUCTS, INC.;
BOYLE-MIDWAY, INC.;
AMAZING PRODUCTS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Filed June 5, 1995)

Before: EDMONDSON and BIRCH, Circuit Judges, and
HILL, Senior Circuit Judge

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9214

D. L. THOMAS;
HAZEL THOMAS,

Plaintiffs-Appellants,

versus

AMERICAN HOME PRODUCTS, INC.;
BOYLE-MIDWAY, INC.;
AMAZING PRODUCTS, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(Filed June 15, 1995)

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

ORDER:

This court's ORDER of 5 June 1995, denying the petition for rehearing is recalled.

The parties are directed to file briefs (not to exceed twelve pages in length), commenting on the effect of *Banks, et al. v. ICI Americas, Inc.*, 450 S.E.2d 671 (Ga. 1994), on this case. Appellants' brief shall be filed no later than

20 June 1995. Appellees' brief shall be filed no later than 22 June 1995. No extensions of time should be expected.

/s/ J.L. Edmondson
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-9214

D. L. THOMAS;
HAZEL THOMAS,

Plaintiffs-Appellants,

versus

AMERICAN HOME PRODUCTS, INC.;
BOYLE-MIDWAY, INC.;
AMAZING PRODUCTS, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(Filed Feb. 9, 1996)

Before EDMONDSON and BIRCH, Circuit Judges, and HILL, Senior Circuit Judge.

ORDER:

In part because we conclude, for the reasons expressed in *I.C.I Americas v. Banks*, 460 S.E.2d 797, 798 n.1 (Ga. App. 1995), that the holding of the Georgia Supreme Court in *Banks v. I.C.I*, 450 S.E.2d 671 (Ga. 1994), would not apply to the injuries involved in this case, we deny the Appellants' Suggestion of Rehearing (or Hearing) En Banc and Appellants' Petition for Rehearing. *See*

also, General Motors Corp. v. Rasmussen, 340 S.E.2d 589 (Ga. 1986) (Georgia law recognizes partial prospectivity).

CONSTITUTION OF THE UNITED STATES

[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
